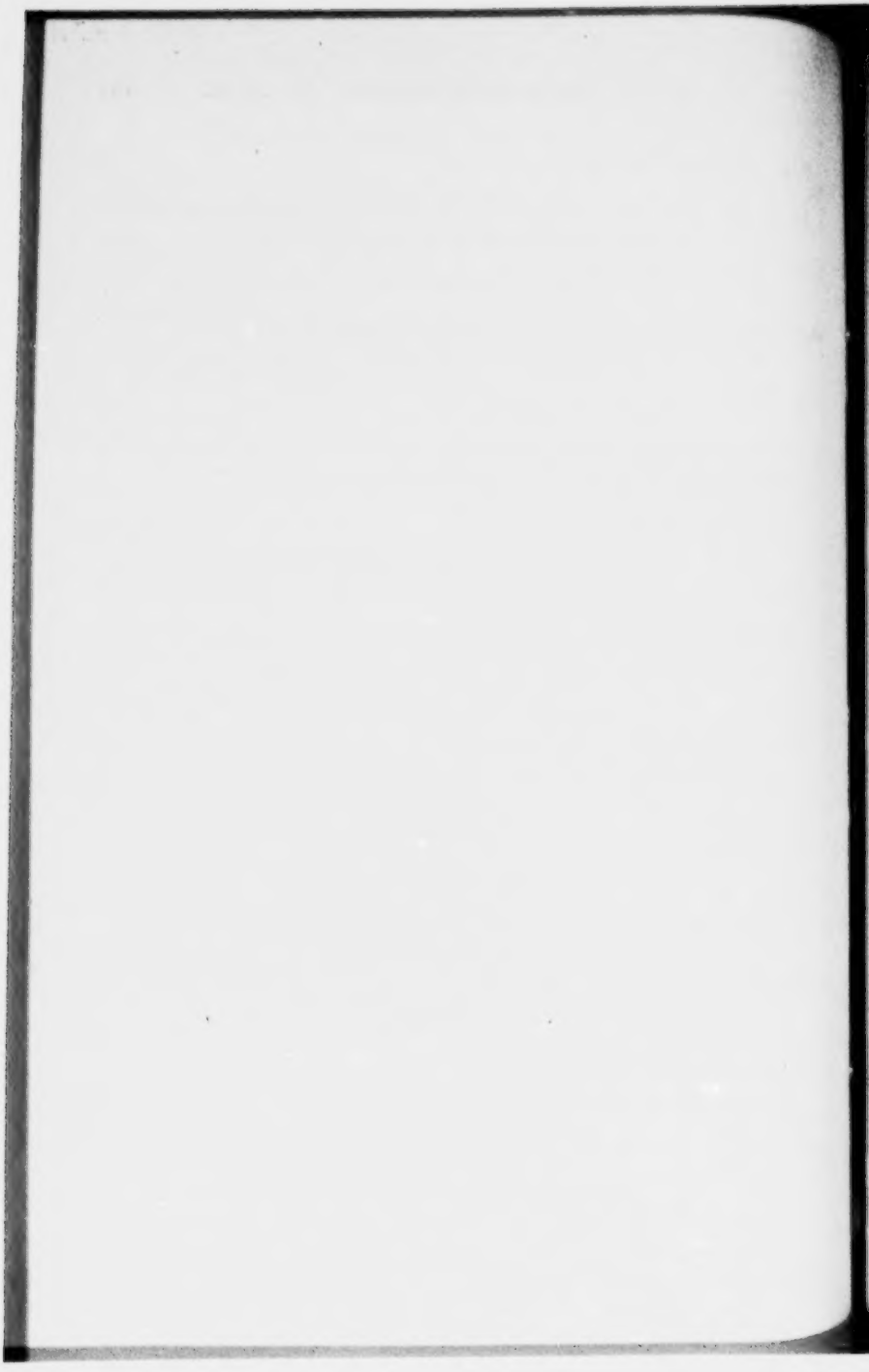


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Supreme Court of the United States.

OCTOBER TERM, 1903.

Office Supreme Court U. S.
FILED
APR 22 1904
JAMES H. McKENNEY, Clerk.

MERRITT CHANDLER,
Appellant.

vs.

ROSCOE D. DIX, Auditor General of the State of Michigan;
LOUIS BRUDER, County Treasurer of Presque Isle County, Michigan;
JAMES H. KERR, County Treasurer of Alpena County, Michigan;
THOMAS D. JAMES, County Treasurer of Cheboygan County, Michigan;
HERMAN LUNDEN, County Treasurer of Montmorency County, Michigan, and
ALLEN S. MARTINDALE, County Treasurer of Otsego County, Michigan,
Appellees.

No. 261

Appeal from the Circuit Court of the United States for the Eastern District of Michigan, Northern Division, In Chancery.

BRIEF FOR APPELLANT.

JOHN A. McKAY,
Solicitor and of Counsel for Merritt Chandler, Appellant.

GEORGE W. WEADOCK,
Of Counsel for Merritt Chandler, Appellant.

SEEMANN & PETERS, PRINTERS AND BINDERS, SAGINAW, MICH.

Supreme Court of the United States.

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BRIEF FOR APPELLANT.

ABSTRACT OF CASE.

This case involves the constitutionality of the General Tax Law of the State of Michigan.

Briefly the system of taxation obtaining in Michigan is the assessment of property by local officers, called Supervisors in Townships and Assessors in Cities and Villages, subject to review by a Board of State Tax Commissioners. The property assessed, both real and personal is without other classification taxed at a uniform rate. If not paid to the local collecting officers within a specified period, the taxes become a lien upon the real estate, are returned to the County Treasurer and by him to the Auditor General (a State officer) as delinquent. The Auditor General obtains *ex parte* an order of publication from the Circuit Judge that it is proposed to take a decree against said lands and sell them commencing the first Tuesday in May for the delinquent taxes. One year is allowed for redemption. No purchaser of a tax title can obtain process for possession until he has served, as provided by law, notice upon the owner of the original title, giving the latter the option within six months of paying 100 per cent. of the purchase price, together with costs and expenses.

The original Bill was demurred to and an order entered sustaining the demurrer. An Amended Bill was filed in accordance with the Rules. For the purposes of this hearing only that part of the Record containing the Amended Bill of Complaint and subsequent pleadings, that is embracing pages 85 to 141, is material.

In making the statement of the case we will quote where found necessary, those provisions of the statute applicable to the different allegations.

The Amended Bill of Complaint naming said defendants and joining their successors in office, sets forth that the Appellant owns lands (specifically described in Exhibit "A" to the Amended Bill of Complaint) in the Counties of Alpena, Cheboygan, Montmorency, Otsego and Presque Isle, in the State of Michigan, against which taxes to the amount of $25,000.00 and upwards have been assessed

under the General Tax Laws of the State of Michigan, viz: the laws of 1869, 1882, 1885, 1889, 1891 and 1893, principally the law of 1893; all of which have been repealed except the General Tax Law of 1893; and the disposition of Appellant's lands is controlled by the law of 1893 and his lands have been sold or are held for sale for such assessed taxes under the provisions of the General Tax Law of 1893.

That it is the duty of the Auditor General of the State of Michigan and the several County Treasurers to enforce collection of said taxes by sale of said lands under said law; and that said lands have been so sold.

That the Appellant has always contributed his just proportion of the taxes of the State.

That by Article XIV, Section 1, of the Constitution of the State of Michigan the Legislature is required "to provide for * * * such deficiency as may occur in the resources;" that there is an annual deficit; that such deficit in the resources of the State, in said Counties and the Townships therein, resulting from individual default, is assessed in a susequent year not upon the taxpayer, who is delinquent, but upon the taxpayers generally; so that those taxpayers, including Appellant, who have already paid their proportion of the taxes, are called upon to pay an additional proportion of the same taxes, thus making their share unequal and illegal.

Amended Bill of Complaint, Par. 16, R. p. 90.

That the Constitution of the State of Michigan, Article XIV, Section 12, provides:

"All assessments hereafter authorized shall be on property at its cash value."

That Appellant's property has not been assessed at its cash value; that although Appellant purchased his said lands with scrip, which could be bought for 50 cents on the dollar, giving

$1.25 in scrip for one acre of land, yet said lands were immediately upon Appellant acquiring them, assessed at $5.00 per acre when Appellant was offering the same for $2.00, then for $1.75 and finally for $1.50 per acre, and was unable to sell the same; that he was offered only $1.00 per acre for said lands; and that by the assessing officer who assessed them at $5.00 per acre and said lands were assessed higher than similar lands of equal value.

Amended Bill of Complaint, Par. 14 and 15, R. p. 89.

That the Legislature of the State of Michigan has construed the words "cash value" as used in said Article XIV, Section 12, of the Constitution in Section 27 of General Tax Law of 1893 as follows:

"The words 'cash value,' whenever used in this act, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. In determining the value the assessor shall also consider the advantages and disadvantages of location, quality of soil, quantity and value of standing timber, water power and privileges, mines, minerals, quarries or other valuable deposits known to be available therein and their value"

That the construction of a statute is not a legislative, but a judicial prerogative; that said construction is not legally warranted; and that the Legislature has usurped the powers and functions of the Court by rendering such legislative judgment or decree in advance of and without any notice or hearing.

Amended Bill of Complaint, Paragraphs 11 and 12, R. pp. 88-9.

That said laws contain provisions requiring the Supervisor or Assessing Officer to demand from the Appellant a state-

ment of his property to be used as the basis of his assessment; other provisions requiring the officers entrusted and charged with the collection of said taxes to demand payment of said taxes; and still other provisions requiring such officers before returning said taxes unpaid and thus making them a charge upon real estate to seize personal property sufficient to pay and discharge them; that none of said demands were made upon the Appellant and his personal property was not seized and collection of said taxes enforced, although at all times he had within the jurisdiction of said officers personal property more than sufficient to satisfy all demands for said taxes.

Amended Bill of Complaint, Paragraphs 18, 19 and 20, R. pp. 91 and 92.

That personal property varying in value from $500 000.00 to $1,000,000.00 in each of the Counties mentioned, was fraudulently and intentionally omitted annually from the Assessment Rolls, thus discriminating against Appellant.

Amended Bill of Complaint, Par. 21, R. p. 92.

That personal property is assessed in some instances at its situs, the residence of the owner, or at a place which is neither its situs nor the owner's residence. (This applies to forest products.)

Amended Bill of Complaint, Par. 23, R. p. 92.

That said General Tax Laws do not furnish any rules for classification of property for assessment based upon relative differences and existing distinctions in property and resting upon an intelligible and reasonable foundation. The only classification attempted is into real and personal.

Amended Bill of Complaint, Par. 23, R. p. 92.

See also Section 19 General Tax Law 1903, hereinafter quoted on Pages 11-16.

That said General Tax Laws of 1882, 1889, 1891 and 1893, undertake to secure a judicial determination of the validity of the assessments thereunder and foreclosure of the tax lien by a judicial sale of the property assessed, but said proceedings violate the XIVth Amendment of the Constitution of the United States for the reasons:

(1.) "That judicial duties are assumed by the Legislature and conferred upon the Auditor General by said laws while to the Courts are delegated executive and ministerial duties; for example, the Legislature in effect pronounces decrees in tax cases while the Court merely acts administratively or clerically in entering and recording such decrees, while on the other hand, the Auditor General, a purely administrative and executive officer, hears and determines controversies regarding and exercises his judgment and discretion in cancelling tax deeds, thereby performing judicial functions constitutionally exercisable only by the Court."

Amended Bill of Complaint, Par. 23, R. p. 93.

The provisions of statute here referred to are as follows:

"If from any cause the hearing on said petition is not had on the day fixed in the notice therefor the same shall stand continued from day to day during the term without the entry of any order of continuance, until disposed of, and if it shall for any reason be found impracticable to hear and determine the objections to all of the taxes specified in such petition within the time herein fixed for that purpose, then and in that case the Court shall, within the time herein named, make a final decree as to all taxes to which no objections have been filed, and also those to which objections have been filed, which the Court has then heard and passed upon."

General Tax Law 1893, Section 67.

"Whenever any lands returned to the office of the Auditor General, or to the County Treasurer during the life of the tax law of eighteen hundred ninety-one, shall have been sold on

account of non-payment of taxes thereon, if the Auditor General shall discover before a conveyance of said land is executed and delivered:

"First. That the land so sold was not subject to taxation at the date of the assessment of the taxes for which it was sold; or

"Second. That the taxes had been paid to the proper officer within the time limited by law for the payment or redemption thereof; or

"Third. That such sale was in contravention of any of the provisions of this act; or

"Fourth. That a certificate that no taxes were charged against said lands has been given by the proper officer, within the time limited by law for the payment or redemption thereof, the Auditor General shall withhold a conveyance of such lands, and shall, on demand, cause the money paid therefor to be refunded to the purchaser with interest thereon at six per cent. per annum: Provided, That in the last mentioned case the person in whose behalf such certificate was given shall at the time of presenting such certificate to the Auditor General, pay to the State Treasurer, on the statement of the Auditor General, all taxes and charges due to the State upon such land at the time such certificate was issued. If the discovery is not made until after the conveyance has been executed and delivered, a certificate of error may be issued in proper form for record; and the deed, if not recorded, shall be surrendered when the purchase money is refunded. If the deed has been recorded the money shall be refunded on a recorded release from the holder of the tax deed.

General Tax Law 1893, Section 98.

(2.) That the order for appearance is "process" and does not run "In the Name of the People of the State of Michigan" as required by the Constitution.

Article VI, Section 35 of the Constitution of Michigan provides:

"The style of all prosess shall be 'In the Name of the People of the State of Michigan.'"

(3.) That the notice of publication, the only service attempted in these tax cases, is not such service as complies with Constitutional requirements.

"The publication of the order and petition aforesaid shall be equivalent to a personal service of notice on all persons who are interested in the lands specified in such petition, of the filing thereof, of all proceedings thereon and of the sale of the lands under the decree, and shall give the Court jurisdiction to hear such petition, determine all questions arising thereon, and to decree a sale of such lands for the payment of all taxes, interest and charges thereon."

General Tax Law 1893, Section 66.

No distinction is made between residents and non residents. No attempt is made to obtain personal service; and none is required. No showing is made to excuse personal service and none is required.

The decree is in reality pronounced by the Legislature. The Court merely acts as a Clerk to record it. The proceedings are kept, not in the office of the Clerk or any other office of the Court, but in the office of the County Treasurer.

The Legislature directs the Court to enter a decree in every instance where no objection is filed, although in the case of another taxpayer, who has had made objection, the tax has been set aside on grounds that invalidate the entire levy.

That the proceedings are not *in personam* and cannot be upheld as *in rem* because there is no seizure of the property into possession of the Court.

Amended Bill of Complaint, Par. 24, R. pp. 92, 93 and 94.

That said laws do not provide for such a sale of Appellant's property as to bring the highest price therefor, but sell it in such a way as to confiscate it.

"For example, said tax law of 1893 provides that the lands shall be sold, not with reference to their value, as determined by assessment or otherwise, but to the person who will pay the tax and take the least undivided interest in the lands therefor, while under former laws it was for a specified interest to be set apart under the statutory rule *e. g.* from the north side of the parcel sold which said methods of sale are contrary to all legal and customary methods of judicial or public sales, and discourage bidding at such a sale for the reason that every person who would become the purchaser of the undivided interest in the parcel offered that would correspond to the amount of the tax for which the same is offered as compared with the total cash value of such parcel takes into consideration, the fact that the purchase of an undivided portion of the parcel offered may mean a law suit to have the premises so sold partitioned, and the amount of his purchase set off to him (said purchaser) so that in practice and effect the entire interest in the lands offered, is sold for the taxes; and said method of selling is illegal for the reason that the statutory rule governing the attempted sale of such lands takes into account only the amount claimed against said lands which, on the basis of the assessment and the rate of taxation is only a small fraction of the total cash value, although the evidence of the latter is on the roll before the State officers, when making such sale; and such system or method of selling for taxes does not consider the entire value of the lands attempted to be sold for taxes and provides no method by which the surplus value between the alleged tax for which the land is being sold and the total cash value can be saved or preserved to the owner."

Amended Bill of Complaint, Paragraph 25, R. pp. 94 and 95.

"On the first Tuesday of May, beginning at ten o'clock a. m., the County Treasurer shall commence the sale of the lands mentioned in the decree upon which the amounts charged shall not have been paid, and shall continue the same from day to day, Sundays and other legal holidays excepted, until so much of each parcel shall be sold as shall be sufficient to pay such amounts. Each parcel described in the decree shall be separately exposed to sale for the total taxes, interest and charges, and the sale shall be made to the person paying the full amount charged against such parcel, and accepting a conveyance of the

smallest undivided fee simple interest therein. No greater interest in any parcel shall be sold than is sufficient to pay the amount of the tax on which the same is sold. If no person will pay the several taxes and charges and take a conveyance of less than the entire thereof, then the whole parcel shall be offered and sold."

General Tax Law 1893, Section 70.

That said tax laws by curative provisions attempt to dispense with the provisions therein for the benefit of the taxpayer or landowner such as the demands therein for payment, seizure of personal property, etc., set forth in Sections 18, 19 and 20 of the Amended Bill of Complaint. (Record page 91.)

"That said Act No. 206 of the Public Acts of 1893, as amended under which all tax proceedings are now conducted is unconstitutional and void for the following reasons:

1. That it does not provide any uniform and equal rule of taxation or such rule of apportionment as is essential to taxation, but discriminates against property and individuals as, for example, under the provisions of Section 19, of said Act, banks and companies incorporated and unincorporated are permitted to deduct their indebtedness from the gross amount of their personal property; while in the case of vessel property, the owner whether a corporation or individual is permitted to deduct its or his indebtedness from the entire amount of its or his property; while in the case of an individual not engaged in banking or not doing business under a corporate name or not engaged in the vessel business, and your orator is such an individual, his indebtedness can be deducted only from his personal credits; from which Section 19, it appears clearly that it is the intention of the Legislature to permit deductions of indebtedness from other property in order to determine the amount of property which shall be assessed to any individual or corporation, and from Sections 5 and 11 of said Act providing that corporations and individuals shall be assessed alike, it further appears that corporations and individuals stand alike and upon the same footing before the law so far as their assessment and taxation are concerned and are subject to the same rules of assessment and taxation, but

it is impossible to apply the foregoing and conflicting sections and rules of assessment and taxation to the property of persons, including corporations and particularly to your orator and his said lands and property without producing great injustice and gross inequality in the assessment and taxation of the same and thereby causing discrimination against and confiscation of his property and thereby denying him the equal protection of the law and depriving him of his property without due process of law in contravention and violation of the Constitution both of the United States and of the State of Michigan.

"2. That your orator is largely indebted in respect of said lands, to-wit: to the amount of fifty cents ($0.50) or thereabout per acre which said indebtedness by reason of said provisions of said law and the construction placed thereon by the defendants and other state officers, your orator is unable to deduct from the assessed valuation of said lands, although property of the same kind and class as that upon which said deductions are allowed to others,thus subjecting your orator and his said lands to discrimination and imposing thereon an unequal and excessive share of taxes and depriving your orator of his property without due process of law."

Amended Bill of Complaint, Par. 28, pp. 95 and 96.

Section 19 of the General Tax Law being Section 3842, of the Compiled Laws of 1897. Michigan, is as follows:

"In taking such assessment the Supervisor or Assessor shall use one of the following blank forms, as may be necessary:

Property of Bankers and Brokers.—The principal or accounting officer of every bank whose capital is not represented by shares of stock, and every private banker, broker or stock jobber shall make out and deliver to the Assessor a statement which he shall verify by oath, showing:

1. The amount of money on hand and in transit.

2. The amount of funds in hands of other bankers, brokers, or other persons, subject to draft.

3. The amount of checks and other cash items not included in either of the preceding items.

4. The amount of bills receivable, discounted or purchased, and other credits due or to become due.

5. The amount of bonds and stocks of every kind except United States bonds, and shares of capital stock of corporations or companies held as an investment or in any way representing assets.

6. All other property appertaining to said business other than real estate.

7. The amount of all deposits made with them or other parties.

8. The amount of all accounts payable, other than current deposit accounts.

9. The description and value of all real estate owned by him or them.

The aggregate amounts of the seventh and eighth items shall be deducted from the aggregate amounts of the first, second, third and fourth items and the remainder, if any, shall be assessed as moneys. The amount of the fifth item shall be assessed the same as other similar property, and the assessor shall make a separate entry of each of these amounts (separate from the assessment of real estate) and the whole shall make up the aggregate personal assessment of such person, party or corporation.

For Pawnbrokers.—Every person or company engaged in the business of receiving property in pledge or as security for money or other consideration or thing advanced to pawner of pledger, shall be held to be a pawnbroker and shall be required to make a statement and return under oath, reciting:

1. The value of all stock in trade actually owned by him or them and the true cash value thereof.

2. The amount and value of all property held in pawn for any pawner, pledger or customer.

3. The aggregate amount of money consideration or value paid and advanced by such pawnbroker thereon.

And the amount of the true cash value of all such property, less the amount of consideration or value paid, shall be assessed as the property of such person or corporation.

Property of Companies.—The president, secretary or principal accounting officer of any company or association, incorporated or unincorporated, except railroad, insurance and telegraph companies and banking corporations, the taxation of which is specifically provided for by law, shall make out and deliver to the Assessor a sworn statement setting forth the following:

1. The name and location of the company, corporation or association.

2. The amount of capital stock authorized and the number of shares into which the same is divided.

3. The amount of capital actually paid in.

4. The market value of the stock or if they have no market value, then the actual value of the shares of stock.

5. The cash value of all its personal property, giving each kind separately as far as practicable.

6. The total of all *bona fide* indebtedness, except indebtedness for current expenses, excluding from such expenses all amounts paid for the purchase or betterment of said property.

7. The description and value of all real property.

The amount of the seventh item shall be deducted from the amount of the fourth item, and the balance, if any, assessed as the cash value of the personal estate. The amount of the sixth item shall be deducted from the amount of the fifth item, and the balance, if any, assessed as personal.

Vessel and Marine Property.—The president, secretary or principal owner of all navigation or transportation companies, and each and every owner of any vessel, steamboat, wharf boat, barge or water craft, shall make out and deliver to the Assessor a sworn statement setting forth:

1. The name of the company.

2. The location of its principal office.

3. The amount of capital stock paid in.

4. The cash value of such stock.

5. The name of each and every boat or vessel owned by such company or individual, with its insurance rate and value.

6. The value of all other personal property used and belonging therewith or thereto.

7. The actual *bona fide* indebtedness upon every such boat or vessel separately.

8. The value of all real property owned by such company or person, with the description of the same, if in his assessing district.

9. The value of all franchises, slips or docks owned or used by such company or person.

The actual value of all such property after deducting the amount of the seventh item shall be deemed the assessable value of such property.

In case of the refusal of the president, secretary, principal accounting officer or owner hereinbefore mentioned to make the statement or statements hereinbefore recited and required, the Prosecuting Attorney shall cause such person, on complaint of such Assessing Officer, to appear forthwith before a Circuit Court Commissioner, who is hereby authorized to issue summons therefor and to order its service and to compel the attendance of said officer or person in obedience to such summons, and to examine them under oath, and make such investigation at the expense of such bank, corporation or person as may enable such Commissioner and Assessing Officer to obtain the information provided for in this section.

For General Purposes. Every owner of property liable to taxation under the provisions of this act being of full age and sound mind, who is a resident of this State, shall make out and deliver to the Supervisor or Assessor on demand, a sworn statement of all the property owned or held by him, as follows:

REAL PROPERTY.

An accurate description of each parcel of land, with the number of acres contained therein.

PERSONAL PROPERTY—CREDITS.

1. All annuities and royalties.

2. All credits of every kind owing to such person, whether such indebtedness is due from individuals or from corpora-

tions, public or private, and whether debtors reside within or without this State, including all deposits in banks or with other corporations or individuals; together with a statement of any part thereof that is secured by real estate mortgage on lands situated in some other State.

3. All *bona fide* indebtedness, owing by such person, giving an itemized statement in detail, how secured, and to whom owing, and the residence of such creditors and the amount due each, provided he desires to have the same deducted from his credits.

PERSONAL PROPERTY—CHATTELS.

1. All shares in banks organized in this State under any law of this State or of the United States, and their cash value after deducting the value of the real estate taxed to banks.

2. All shares in foreign corporations, except national banks, and their cash value.

3. All shares in other corporations organized under the laws of this State when the property of such corporation is not exempt, or is not taxable to itself, and their cash value.

4. All moneys.

5. The value of all gold and silver plate, watches, diamonds and jewelry.

6. The value of all household furniture, over and above exemptions.

7. The number and value of all billard tables and other personal property used in connection therewith, and all other similar property owned or in possession by him.

8. All patent rights and their value.

9. The number and kinds of domestic animals not exempt, and their value.

10. All carriages and other vehicles, and sleighs kept for pleasure or hire, and their value.

11. All mechanical and agricultural implements and tools, and their value.

12. All machinery not affixed, to real property, and its value.

13. All ships, boats and vessels, whether at home or abroad, and their value.

14. All merchandise and stock in trade, including grain in elevators, and its value.

15. All logs, timber, lumber, posts and ties, and their value, where the same is situate on the second Monday in April, as near as may be, and the distinctive marks thereon, if any, and place of destination in this State.

16. All other goods, chattels and personal property not heretofore specifically mentioned, and their value, except property specifically exempt from taxation.

17. All goods and chattels which are exempt from taxation.

18. All moneys or other personal property held as assignee, attorney, executor, guardian or agent, liable to taxtion under the laws of this State.

19. The number of dogs of all kinds over six months old.

20. The value of all elevators, warehouses and improvements on lands, the title to which is vested in any railroad corporation, and the value of the contents."

That under the provisions of said law if there are no bidders for the lands offered for sale for delinquent taxes, said lands so offered, and for which no bids are made, are bid off by the County Treasurer in the name of the State for the State, County and Township in proportion to the taxes, interest and charges due each; and if so bid off to the State for consecutive years the said lands so bid off under the provisions of said law, may without any hearing or opportunity to the owner or others interested therein to be heard, be declared homestead lands and open for entry as State homestead lands at the price of ten cents per acre, coupled with other conditions including five years' continous residence on said lands and improving the same; and when so set apart for homestead lands, all the taxes thereon are cancelled, although far exceeding in amount said sum of ten cents per acre and said lands are thereupon exempted from taxation; said lands, including some lands of your orator (Appellant) have been so homesteaded,

that is, placed upon the State homestead list, in the Counties and Townships in which your orator's (Appellant's) said lands are situate, whereby your orator (Appellant) and his said lands have been discriminated against and a greater burden imposed upon him and them, and the credits, property and money of said Townships and Counties confiscated by the State with resulting losses, to, and increased taxation of your orator (Appellant) and his said lands, thereby denying to your orator (Appellant) the equal protection of the law and depriving him of his property without due process of law.

Amended Bill of Complaint, Par. 28, Sub-Div. (5), Rec. pp. 97 and 98.

The statute here referred to reads as follows:

"Section 130. All taxes charged against such lands in the office of the Auditor General at the time they are deeded, shall be cancelled, but no part of such taxes due to the Townships or County shall be charged to the State, but each shall bear the share of loss in such taxes as properly belong to each, and the Auditor General shall make a list of all such lands in each County and shall transmit such list to the County Treasurer, and shall direct such County Treasurer to notify the Board of Supervisors at its next session that such lands belong to the State and are no longer taxable, and such Board of Supervisors shall cause all such lands so deeded and certified to said Board to be stricken from the tax rolls of the several Townships in their County, and said lands shall not be liable to any assessment for any purpose until the same are again sold by the State and notice of such sale given to the County Treasurer by the Commissioner of the State Land Office as herein provided.

"Sec. 131. All such lands shall be held by the Commissioner of the State Land Office subject to entry as homestead lands, and if any person shall apply for them or any part thereof, not to exceed in quantity two hundred forty acres for any one person so applying, and shall file an affidavit that such person desires such lands for actual settlement, for the purpose of a homestead, the Commissioner shall issue a certificate to such

person for such land upon the payment of the sum of ten cents per acre, conditioned that such person shall reside continuously upon said lands for the period of five years and improve the same," etc.

General Tax Laws 1893, Secs. 130 and 131.
Compiled Laws 1897, Mich., Secs. 3952 and 3953.

Since this suit was commenced, the above law has been amended to read as follows:

"The proceeds for any such sale shall be accounted for to the State, County and Township in which said lands are situated pro rata according to their several interests therein arising from the non-payment of taxes thereon, as such interest shall appear in the office of the Auditor General."

Public Acts 1901, Mich., No. 141, p. 188.

That a State Board of Tax Commissioners was created by Act 154 of the Public Acts of 1899, the same being an amendment to the general tax law. It is objected that judicial power was conferred upon this Board; that it is destructive of local self government; and that it invades the liberty of the citizen by illegal inquisitions.

That the Constitution of the State of Michigan provides, Art. 4, Sec. 22, that "The Legislature shall provide by law that the furnishing of fuel and stationery for the use of the State, the printing and binding the laws and journals, all blanks, paper and printing for the Executive Departments, and all other printing ordered by the Legislature shall be let by contract to the lowest bidder or bidders, who shall give adequate and satisfactory security for the performance thereof." But the General Tax Law authorizes and permits the Auditor General of the State to select a newspaper for the publication of

the notices required by the General Tax Law, and pay the publisher thereof forty cents (40c) per description, although five cents per description would be a reasonable charge for such printing; and such printing is generally sub-let by such papers for less than five cents (.05c) per description.

Amended Bill of Complaint, Pars. 31 and 32, R. pp. 100 and 101.

The provision of the Tax Law is as follows:

"The cost of such advertising shall in no case exceed the sum of forty cents for each description of land so advertised and sold, and shall be paid by the State Treasurer upon the warrant of the Auditor General, out of the general fund of the State."

That the Auditor General includes as a charge against each description of land offered for sale one dollar (formerly seventy cents) for cost of advertising and other expenses of sale under said laws, although in the taxes collected all the expenses of his department and all other departments of State, embracing those very items of advertising, etc., are included; and although there is a collection fee provided by law which is collected in addition to said charge for expenses of sale, etc.

Amended Bill of Complaint, Pars. 31 and 32, R. pp. 100 and 101.

That even the provisions of law governing the assessment and collection of taxes have been continuously and persistently disregarded, so that said assessments and taxes are void.

Rec. pp. 100, 101 and 102.

That void assessments can never be made the foundation for a valid decree.

That the methods of sale provided by the tax law discriminate against the owner of property. The lands are sold, not

to the highest bidder, but to the person who will accept the smallest interest in the lands and pay the tax.

Amended Bill of Complaint, Par. 39, Rec. p. 104.

The provision of law is as follows:

"Each parcel described in the decree shall be separately exposed to sale for the total taxes, interest and charges, and the sale shall be made to the person offering to buy for any given tax and paying the full amount charged against such parcel, and accepting a conveyance of the smalles undivided fee simple interest therein. No greater interest in any parcel shall be sold than is sufficient to pay the amount of the tax on which the same is sold. If no person will buy for any of said several taxes and pay the balance thereof and take a conveyance of less than the entire thereof, then the whole parcel shall be offered and sold."

General Tax Law 1893, Sec. 70.
Compiled Laws 1897, Mich., 3893.

That the method of equalization provided by the tax law is discriminating, for the reason that in apportioning the State tax by the County Board of Supervisors to the various townships, the assessment is equalized by taking into consideration only the real property in each township, and omitting the personal property; but in apportioning the State tax to the various counties, the State Board of Equalization takes into acount the total taxable property in each County, both real and personal.

The Board of Supervisors sits as a County Board of Equalization, and for the State there is a State Board of Equalization.

Amended Bill of Complaint, Par. 41, p. 104.

The statute reads as follows:

"The Board of Supervisors in each County shall, at their session in October in each year, examine the assessment rolls of the several Townships, Wards, or Cities, and ascertain whether the relative valuation of the real property in the respective Townships, Wards, or Cities has been equally and uniformly estimated. If, on such examination, they shall deem such valuation to be relatively unequal, they shall equalize the same by adding to or deducting from the valuation of the taxable property in any Township, Ward or City, or Townships, Wards, or Cities, such an amount as in their judgment will produce relatively equal and uniform valuation of the real property in the County, and the amount added to or deducted from the valuation of any Township, Ward of City, shall be entered upon the records, etc."

General Tax Law, 1893, of Michigan, Sec. 34.
Compiled Laws 1897, of Michigan, 3857.

The State Board of Equalization is constituted and empowered as follows:

"Section 1. The People of the State of Michigan enact, That there shall be a State Board of Equalization, to consist of the Lieutenant Governor, Auditor General, Secretary of State, State Treasurer, and Commissioner of the Land Office, whose duty it shall be, in the year eighteen hundred and fifty-one, and every fifth year thereafter, to equalize the assessments on all taxable property in the State, except that paying specific taxes, as hereinafter provided.

Sec. 2. It shall be the duty of the Board to meet at the Capitol in the Village of Lansing, on the third Monday of August, and the persons composing it shall organize by choosing one of their number chairman, and the Deputy Auditor General, or one of the Clerks in the office of the Auditor General, shall act as Secretary, who shall keep a record of the proceedings, which shall be certified by said Chairman and Secretary, and filed in the office of the Auditor General."

Compiled Laws 1897, Mich., Secs. 129 and 130.

That the general tax law provides that in case the tax title is held void or invalid, the State shall repay the purchaser the amount of his purchase price with interest at the rate of eight per cent per annum. This is claimed to be illegal and unconstitutional and class legislation, in that it favors the purchasers of tax titles and is forbidden by Art. 14, Sec 6, of the State Constitution, which is: "The credit of the State shall not be granted to, or in aid of, any person, association or corporation."

Amended Bill of Complaint, Par. 45, Rec. p. 105.

That the General Tax Law of 1893 permits redemption after one year, providing the owner of the original title pays to the purchaser of the tax title the amount paid therefor with one hundred per cent, costs and charges to be added.

That so far from the tax law being general, it permits some municipalities, for instance the City of Grand Rapids, Michigan, to enforce the collection of city taxes by a sale by the City authorities, after publication of a notice of the time and place of such sale of the lands against which said taxes are assessed, without taking any judicial proceedings; but it does not permit the Townships in which Appellant's lands are situate to do so, but the sale of the same is governed by the general provisions of the Tax Law and the Auditor General, a State officer, has charge of the proceedings.

Amended Bill of Complaint, Par. 47, Rec. pp. 105-6 and 7.

The Appellant hereby offers and is willing and ready to pay any taxes due by him, in case the same can be separated from the illegal taxes and should the laws herein complained of be held constitutional.

That he claims that the illegal and void assessments cannot be distinguished or separated, but extend to and affect the whole tax levy.

That until after the law of 1893 was passed tax titles were considered and generally held void in the State of Michigan, and Appellant so considered claims and titles for taxes asserted against his lands; but since 1893 the Courts of the State of Michigan have been upholding tax titles. Appellant thereupon promptly filed his Bill in this case.

That at the time of the filing of the original Bill herein, no third persons were interested in the lands described in the schedule hereto attached.

That the Tax Law of 1882 was a departure from the previous policy of the State in enforcing and collecting taxes.

That although tax titles, previous to the passage of the general Tax Law of 1893, were considered of no value, now, however, the Auditor General attempts and pretends to acquire, on the sale of said lands for taxes, the fee simple title thereto; and claims to have cut off all right, title or interest of the Appellant in and to said lands; and that said Auditor General and the several County Treasurers mentioned are asserting title to said lands and attempting or threatening to dispose of the same without regard to the Appellant's rights; but Appellant claims that they are trespassers, acting without warrant or authority of law, and that the proceedings which have been taken and the titles which they are asserting constitute a cloud upon the title of Appellant to said lands, which ought to be removed, and Appellant is without any adequate remedy at law.

That even if said laws were held to be constitutional, yet the proceedings thereunder have been unconstitutional.

That the unconstitutional and void features and provisions of said laws extend to and affect said laws as a whole, and

cannot be separated therefrom without doing violence to the whole.

That the intention of the Legislature, as expressed in said laws, cannot be carried into effect without said unconstitutional parts; and that therefore said laws must in their entirety be held unconstitutional.

That said lands are of the value of fifty thousand dollars and upwards.

That this Bill is filed to prevent a multiplicity of suits.

Appellant prays as relief:

That said laws may be declared unconstitutional and void.

That all assessments of said lands, taxes levied thereon, and sales thereof made for taxes, by virtue of said laws, may be cancelled, held for naught, and declared null and void as a cloud upon the title of Appellant.

That all conveyances made in pursuance of said laws may be declared null and void and ordered to be delivered up to be cancelled, and in default thereof that the decree herein operate as a re-conveyance.

That the title of Appellant may be ~~quited~~ quieted and he declared the owner in fee simple of said lands and entitled to the possession thereof.

That the defendants and all persons claiming through them may be required to yield and deliver up possession of said lands.

That the defendants may be perpetually enjoined from assessing said lands, levying any taxes thereon, making any sales thereof, or otherwise disposing of said lands, in pursuance of the provisions of said laws.

And for general relief.

Rec. pp. 111 and 112.

The defendants have made no attempt to meet the case made by the bill on the merits, but have filed demurrers, claiming that the bill should be dismissed on technical grounds.

The Auditor General, Perry F. Powers, who succeeded Roscoe D. Dix, Auditor General of the State of Michigan, when the bill was filed,alleges the following grounds of demurrer:

"1. That the complainant hath not in and by his said amended bill made or stated such a case as entitles him in a Court of Equity to any discovery from this defendant, or to any relief against him as to the matters contained in the said amended bill or of any such matters.

"2. The complainant is not entitled upon said bill to the relief he prays for because he had a plain and adequate remedy at law.

"3. It does not appear in and by said amended bill that the matter in dispute exceeds the sum of two thousand ($2,000) dollars exclusive of interest and costs.

"4. It appears upon the face of said bill that the complainant has been guilty of gross laches in regard to the matters therein set forth.

"5. It appears by the said amended bill of complaint that this suit is in its effect a suit against the State of Michigan.

"6. An amended bill of complaint will not lie against the successor in office of Roscoe D. Dix, Auditor General of the State of Michigan." (R. p. 122.)

The demurrers filed by the County Treasurers are similar to that filed by the Auditor General, simply alleging in addition that the County Treasurer is improperly joined. (R. pp. 123-132.)

The Court below sustained the demurrers on the ground that the suit had abated by reason of the retirement of Roscoe D. Dix and the election of his successor and that this was in

effect a suit against the State of Michigan; and an order and decree entered in accordance with said opinion dismissing Appellant's Bill and Amended Bill.

See Opinion, etc. Record pps. 133, 134 and 135.

II.

The errors relied upon are as follows:

"That said Circuit Court erred in dismissing the said Bill of Complaint and Amended Bill of Complaint of complainant and Appellant.

"That said Circuit Court erred in not entering a decree for said complainant and Appellant upon the pleadings in said cause.

III.

ARGUMENT.

In the first place it is important to consider the nature of a demurrer as a pleading.

A demurrer admits all facts well pleaded.

The Appellant submits that in the Amended Bill of Complaint he has averred, and the defendants, by their demurrers, admit, facts that entitle him to the relief prayed for, unless, as a matter of law, this suit is in reality one against the State; or has abated by one Auditor-General—a State Officer, whose

duties are prescribed by law, elected every two years—having succeeded another.

The first ground of Demurrer, that the Amended Bill does not make or state a case of equitable jurisdiction, does not appear to have been considered by the Circuit Judge and we submit that inspection of the Amended Bill itself effectually disposes of this ground of Demurrer.

The Appellant asks to have a cloud removed from his title, to cancel and set aside assessments, taxes, proceedings and conevyances. These are not only remedies cognizable by and peculiar to a Court of Equity, but cannot be obtained in a Court of Law. This disposes of the second ground of Demurrer, that Appellant has an adequate remedy at law.

It is alleged that the taxes complained of and which it is attempted to set aside, amount to $25,000.00 (R p. 87, fol. 148, Am. Bill, par 8), and that the lands to which title is involved are of the value of $50,000.00 (R. p. 111, fol 190, Am. Bill, par. 65). It is also alleged specifically that the matters and amount in dispute herein exclusive of all interest, costs and charges, exceed in each of said Counties, $2,000.00 (R. p. 85, fol. 144, Am. Bill, par 2). This should dispose of the third ground of demurrer, that the jurisdictional amount is not involved.

As a fourth ground of demurrer it is alleged that it appears on the face of the Amended Bill of complaint that Appellant has been guilty of gross laches.

Appellant has been in continuous possession of said lands (R. p. 89, fol. 150, Am. Bill, par. 13) and no third persons have acquired any interest therein. (R. p. 108, fol. 186, Am.

Bill, par. 52.) Under such circumstances there can be no laches. In addition Appellant has always claimed and contended that said Tax Laws and all proceedings thereunder are absolutely void.

In Galliher vs. Cadwell, this Court say the cases "all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relations of the property or the parties."

Galliher vs. Cadwell, 145 U. S., 368 at p. 373.

This statement of the legal principle was afterwards cited and followed in Johnson vs. Atlantic G. & W. I. Transit Co., 156, U. S., 618 at p. 648.

In Bartlett vs. Ambrose, 42 U. S. C. C. App. 381; 76 Fed. Rep. 483, it was held that the owner of land having every reason to believe taxes paid is not guilty of laches though barred by the Statute of Limitations. The Appellant presents an even stronger case. He is not barred by the Statute of Limitations, and he believed and asserted the taxes to be void and until within a short time previous to the filing of the Bill the taxes and titles founded thereon had not been enforceable in the Courts.

Appelant's whole case is based upon the facts that said laws are void and unconstitutional; and that all the proceedings thereunder are without jurisdiction and void.

"A want of jurisdiction may always be taken advantage of by the parties whose interests were prejudiced."

Gillett vs. Needham, 37 Mich., 147.

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained.

Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale, by virtue of its authority, finds himself without title and without redress. The first and most material inquiry in relation to a judgment or decree, then, is in reference to its validity. For, if it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any Legislative or other department of the Government, can invest it with any of the elements of power or of vitality. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered or in some other action."

Freeman on Judgments, (4th Ed.) Sec. 117.
Cook vs. Lasher, 73 Fed. Rep., 701 at pp. 707-8.

It is unnecessary to multiply anuthoities on this proposition.

But Appellant was in possession. "A person who has a lawful right; and is actually or constructively in possession, can never be required to take active steps against opposing claims. The law does not compel any man, who is unassailed, to pay any attention to unlawful pretences which are not asserted by possession or suit."

Groesbeck vs. Seeley, 13 Mich., 329 at p. 343.

Hence laches cannot be imputed to Appellant.

Two grounds of Demurrer remain in addition to the one that the County Treasurers' are improperly joined.

The County Treasurers' conduct the tax sales and perform other duties under the General Tax Law.

It would seem, then, that they should be joined as parties. If, however, they are improperly joined, that is an objection that can be cured by Amendment, and need not detain us.

We submit, however, that they are proper parties.

In the case of the Superior Canal and Railway Co. vs. Auditor General, 79, Mich., 351, a Bill was filed for the purpose of annulling certain school taxes and enjoining their collection, setting forth the illegality of the taxes and praying that they may be decreed to be unauthorized, illegal and void, and also praying for a perpetual injunction restraining defendants from advertising and selling said land for said taxes. It was held that the Auditor General was a proper party, in the following language, page 354, viz: *"We think that the Auditor General and County Treasurer are proper parties to the suit. The former initiates the proceedings for the sale of the lands, and the Treasurer makes the sale. The decree to be finally rendered in the case will affect their action in the premises, and determine whether or not they shall proceed under the tax law to a sale."*

Is this a suit against the State? and; Has this suit abated by reason of the fact that Dix, Auditor-General, has been succeeded by Powers, Auditor-General?

Let us discuss the last ground of Demurrer first.

Defendants rely upon the case of Warner Valley Stock Co. vs. Smith, 165 U. S., 28, which was a case where some affirmative action was sought against Hoke Smith, once Secretary of the Interior of the United States, who had resigned when that case came before this Court, and it was held that the suit had abated for the reasons:

1. That officers of the United States differ from a municipal board, which is a continuing corporation (although its individual members may be changed) and to which in its corporate capacity a writ of mandamus may be directed; and,

"Cases in which it has been held by this Court that an abatement took place by the expiration of the term of office have been those officers of the Government whose alleged delinquency was personal, and did not involve any charge against the Government whose officers they were."

Water Works Co. vs. Barnett, 103 U. S., 180, at pp. 484 and 485.

2. That the mandatory injunction prayed for was in effect equivalent to a writ of mandamus to the Secretary, and as it was issued to compel him to perform a duty, it necessarily followed that on the death, or retirement, of an officer, the writ must abate in the absence of any statutory provision to the contrary; for his successor might comply with the demand and render the interposition of the Court unnecessary.

Neither of these reasons apply to this case. The Appellant does not seek to have the Auditor General perform a discretionary act, but is attempting to prevent the Auditor General, whose duties are prescribed by an unconstitutional statute, from pursuing a policy and procedure prescribed by that unconstitutional law. Whoever the Auditor General is, he has no option under the law but to obey its provisions.

We are not seeking to compel any course of action on the part of the Auditor General, but merely wish to prevent his injuring Appellant in his person and property by the enforcement of a law which is unconstitutional.

This is a case where the wrong has been done and continues and will continue unless corrected by this Court. We do not seek to control some future act but to prevent an unlaw-

ful and unconstitutional act already performed from working further injury; in other words, we ask to have an accomplished act undone. In the case against Secretary Smith, where a mandatory injunction was refused, an appeal or demand lay to his successor and might, as this Court suggests, be effectual. In the case at bar a demand upon the successor of Roscoe D. Dix would be useless and of no more avail than a demand upon Roscoe D. Dix himself. The law, not the discretion of the Auditor General, determines his action.

It would be unreasonable to permit this action to abate, for, in the case at bar, the defendants have no option but to obey the unconstitutional law. As to them, it is constitutional until declared unconstitutional by a Court of competent jurisdiction. In fact, it is their rule of conduct while occupying their offices, and unless set aside, constitutes the rule of conduct of their successor or successors, as it did that of their predecessors. No demand made upon them would alter their administration of the law.

Powers, Auditor General, is defending this suit and is represented here by the Attorney General of the State of Michigan and other Counsel, the same as Dix, Auditor General, would have been had he not retired from office. The present Auditor General is taking advantage of every act of his predecessor, of which we complain; and if he claims the benefit of those acts and assumes the defense of this suit, even if the State stands behind him in making that defense, he will not and cannot be heard to urge this ground of demurrer. *He is estopped from doing so.*

The principle of the leading case has never been applied to cases other than those of Mandamus nor extended to officers other than those of the United States. The principle has been carried as far as it should. The difference between a Petition for Mandamus and a Bill filed to obtain, not a Mandatory

Injunction, but an Injunction which is a Restraining Order, suggests the limitation of the principle. *The cases where it has been held that they have abated by the retirement of the officers, are all cases where it was sought to enforce a personal duty and were based upon personal default.* The case at bar does not proceed upon such a theory.

The principle should never be applied where it is sought to reach a past act performed under authority of an unconstitutional law, where the mischief is complete. *In such a case the successor should not profit by his predecessor's wrong.* We do not believe that the Court and the law are powerless in such a case.

We believe, however, that the case is covered by Statute:

"The Auditor General shall be made a party defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as State tax lands, or which have been sold as such or which have been sold at annual tax sales, or for purpose of setting aside any taxes returned to him and for which sale has not been made; in all such cases a copy of the Bill of Complaint or Petition shall be served upon the Prosecuting Attorney at the time of commencing the action, who shall send a copy thereof within five days to the Auditor General, which said service shall be in lieu of the service of process. Upon so being made a party, it shall be the duty of the Auditor General, whenever he shall, in his discretion, deem the same to be expedient to the end that the State of Michigan may be fully protected, to cause the Attorney General to represent him in such proceedings. In any suit or proceedings instituted for the purpose in this section mentioned, no costs shall be taxed against either party to the action."

General Tax Law 1893, Sec. 144.
(Amendment added by Act 97 of Public Acts of Mich., 1899.)

This Statute makes the Auditor General a necessary party to all proceedings involving the legality of any tax or proceeding under the General Tax Law. *Such being the case, the action lies against the successors of the Auditor General in office when the Bill was filed, and such Bill can properly be Amended to include such successor or successors.*

The successors of the Auditor General against whom the Bill was filed, stands in exactly the same position as a purchaser of property *pendente lite*.

If suitors are compelled to begin anew every time there is a change in the office of Auditor General or County Treasurer, it might be impossible to obtain relief, for the length of time required to get a hearing in a Court of last resort would probably in every case be greater than the tenure of office of any single Auditor General or County Treasurer. In fact the case was never intended as an authority or precedent where, as here, negative relief is sought.

Officers of the United States may act in a judicial rather than an administrative capacity, and the duties performed by the Secretary of the Interior are often judicial; but by law the duties of an officer of the State of Michigan, other than the judicial officers, are administrative, and it is prohibited administrative not discretionary action that we are attempting to control.

We submit also that this is not a suit against the State.

It is true that the Eleventh Amendment of the Constitution of the United States in effect prohibits any suit, in law or equity, being commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign State. Litterally construed, this may not prevent jurisdiction in this case, even if held to be a suit

against the State; for Merritt Chandler, the Appellant, is a citizen of the State of Michigan, and the Amendment only refers to citizens of another State or of a foreign State.

It is presumed, however, that the intent was to prohibit a suit by any private individual against the State even, althought it be one of its own citizens claiming rights under the Constitution of the United States.

In construing this Amendment, however, this Court has distinguished between a State and its officers, and it is now a well recognized distinction that *while a private citizen cannot bring a suit against the State to compel it to perform a contract or to recover money from it, still he can restrain its officers as such from illegally appropriating his property and can recover from State officers property of his own which they are illegally detaining.*

While it has been held by the Courts of the State of Michigan that a State could not be sued in its own Courts, still this doctrine has been held within narrow limits; and in the case of the Bank vs. Hastings (1 Douglas, 225), it was held that this rule applies only where a State is made a party defendant to the record; and that where the late Auditor General, and his successor in office and other State officers were defendants, and it was sought to reach property held by them in their official capacity, that the Court had jurisdiction, although the State might be interested in the subject matter of the suit. In making this decision, the Supreme Court of the State of Michigan followed Osborne vs. Bank of the United States, 9 Wheaton, 738.

In that case (Michigan State Bank vs. Hastings), which was a suit against the Auditor General and his successor in office and others, we have the pivotal question in this case determined, viz.: *"That an injunction bill may be maintained*

against the Auditor General of the State and his successors in office."

The Federal decisions, when closely examined, are all one way on this question under like facts, and that is in support of our position, that the Bill can be maintained.

For the elementary law as laid down by the text-writers upon this question we cite Constitution of the United States by Tucker, Vol. 2, page 791, as follows:

"The decisions cited in the note hold that no suit against a State or its officers is allowed by the eleventh amendment to compel any affirmative action against the State or its officers. The State cannot so be enforced; but where the State through its officers, is taking affirmative action against a citizen, contrary to his constitutional right, he may either prevent it by injunction or redress it by an action against the officer, and, because the officer is without constitutional authority from the State to do the act, judgment will be allowed against the officer. It will be noted that this is substantially the same principle upon which the decision in Lee vs. United States, heretofore referred to, rested. In both cases the officer of the State was the State, as far as any suit against him was concerned, where he performs the duties which the State has constitutional power to impose upon him; but where the State has no such authority to impose the duty, his act is defenseless under the shield of the State, and he is liable for it as an individual."

The rule as laid down in Guthrie on "The Fourteenth Amendment to the Constitution of the United States," is as follows (pages 176-177):

"It is, therefore, essential that it should appear that any suit in equity is not against an officer of the State in his official capacity, to compel him to do or refrain from doing any act

as such an officer, but that the ground of the application is that the defendant is acting without authority of law, or, what is the same thing, under the pretense of a void statute, or threatening to do an act which, being without authority of law, cannot constitute official action, and therefore is but a trespass. When State officers are seeking to enforce a statute which deprives the individual or corporation of property without due process of law, and there is no plain, adequate and complete remedy at law, an injunction may issue against such officers, upon the theory that the individual is restrained from a trspass acting under pretended authority of a void law. The final conclusion of numerous cases in the Supreme Court is that where a suit is against defendants who claim to act as officers of the State, and who, under color of an unconstitutional statute, permit acts of wrong and injury to the property of the plaintiff, and the proceeding is brought to recover money or property in their hands unlawfully taken by them on behalf of the State, or for compensation for damages, or to restrain threatened illegal action, such a suit is not, within the meaning of the eleventh amendment, an action against the State, but against individual trespassers."

The provision of the eleventh constitutional amendment preventing suits against the State is limited to cases where the State is a party to the record. See Desty's Federal Procedure, (9th Ed.,) Vol I, pages 25 and 26 and cases there cited.

The case of Osborne vs. President, Directors and Company of the Bank of the United States, 9 Wheaton, 738, decided in 1824 by Chief Justice Marshall, was against the Auditor General of the State of Ohio to prevent him from proceeding against complainants under an act of the Legislature to levy and collect the taxes from all banks, individuals, &c. At page 856, the Court said: "It may, we think, be laid down as a rule which admits of no exception, that in all cases where juris-

diction depends upon the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the Constitution over suits against states, is, of necessity, limited to those suits, in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens. The State not being a party on record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

The case of Davis vs. Gray, 16 Wallace, 203, was a case against the Governor and Commissioners of the General Land Office, page 210 where a person who had been appointed a receiver of a railroad to which a large grant of lands had been made by the State was seeking to enjoin the officers of the State who had decreed the lands forfeited to the State from granting them to other persons. The bill in this case was demurred to because it was alleged that the relief asked was prohibited by the eleventh amendment to the Constitution. (page 214.)

Justice Swayne, rendering the opinion of the Court, on page 220, affirmed the Osborne case

In the case of the United States vs. Lee, 106 U. S., 196, the question was involved as to whether or not the United States could be sued, and it was there held that the doctrine that the United States could not be sued had no application to the officers of the United States, who, as such officers, hold possession of property and are sued therefor by persons

claiming to be the owners of the property, or entitled threto; but the lawfulness of that possession and the right or title of the United States thereto may, by a Court of competent jurisdiction, be the subject matter of inquiry and adjudged accordingly.

The Virginia Coupon Case, 114 U. S., 270, is a case where an action of detinue for personal property was against persons for delinquent taxes, in payment of which the parties had duly tendered coupons cut from bonds of the State of Virginia under the Funding Act of March 13, 1871. The Osborne case was cited on page 296, and we call especial attention to the 8th and 9th subdivisions of the syllabus.

"8. The State has passed no such law, for it cannot; and what it cannot do, in contemplation of law it has not done. The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax thereafter taken to be without warrant of law, and therefore a wrong. This strips the defendant of his official character, and convicts him of a personal violation of the plaintiff's rights for which he must personally answer.

"9. It is no objection to the remedy in such cases that the Statute, the application of which in the particular case is sought to be prevented, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

See also case In re. Ayres, 123 U. S., 427, from bottom of page 500 to and including page 506.

The case of Penoyer vs. McConnaughty, 140 U. S., page 1, is a suit in equity against Land Commissioner of the State of Oregon brought by the purchaser of swamp and overflowed lands in order to restrain the defendants from doing acts which the bill alleges are in violation of his contract with the State when he purchased the lands, and which are unconstitutional, destructive of the plaintiff's rights and privileges, and which it is alleged will work irreparable damage to his property rights so acquired, and is not a suit against the State within the meaning of the eleventh amendment to the Constitution of the United States. On pages 9 and 10, Justice Lamar drew the distinction between cases directed against the State and the other class of cases, to which this belongs, where suit is brought against the defendants who are claiming to act as officers of the State in the following language: "It is well settled that no action can be maintained in any Federal Court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides that "no State shall pass any law impairing the obligation of contracts." This immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the Court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself.

"In the application of this latter principle, two classes of cases have appeared in the decisions of this Court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the State, as representing the State's action and

liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. In re. Ayres, 123 U. S., 443; Louisiana vs. Jumel, 107 U. S., 711; Antoni vs. Greenhow, 107 U. S., 769; Cunningham vs. Macon & Brunswick Railroad, 109 U. S., 446; Hagood vs. Southern, 117 U. S., 52.

"The other class is where a suit is brought against the defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty purely ministeral—is not, within the meaning of the eleventh amendment, an action against the State. Osborne vs. Bank of the United States, 9 Wheat., 738; Davis vs. Gray, 16 Wall, 203; Tomlinson vs. Branch, 15 Wall, 460; Litchfield vs. Webster County, 101 U. S., 773; Allen vs. Baltimore and Ohio Railroad, 114 U. S., 311; Board of Liquidation vs. McComb, 92 U. S., 531; Poindexter vs. Greenhow, 114 U. S., 270."

Penoyer vs. McConnaughy above cited.

We regard this case as conclusive of the questions in the case at bar, and ask for its careful consideration by the Court.

Its doctrine was affirmed in 149 U. S., pages 164 to 191. We quote from pages 190-191, as follows: "The object of this petition was, we repeat, to protect the property, but even if it were regarded as a plenary bill in equity properly brought for the purpose of testing the legality of the tax, we ought to

add that in our judgment it would not be obnoxious to the objection of being a suit against the State. It is unnecessary to retravel the ground so often traversed by this Court in exposition and application of the eleventh amendment. The subject was but recently considered in Penoyer vs. McConnaughy, 140 U. S., 1, in which Mr. Justice Lamar, delivering the opinion of the Court, cites and reviews a large number of cases. The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State; or, for compensation for damages; or, in a proper case, for an injunction to prevent such wrong and injury; or, for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial; such suit is not, within the meaning of the amendment, an action against the State.

"And while it was conceded that the principle stated by Chief Justice Marshall in the leading case of Osborne vs. Bank of the United States, 9 Wheat., 738, that 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that, 'the eleventh amendment is limited to those suits in which a State is a party to the record,' had been qualified to a certain degree in some of the subsequent decisions of this Court; yet it was also rightly declared that the general doctrine there announced, *that the Circuit Court of the United States will restrain a State officer from executing an unconstitutional statute of the State, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the Constitution, and would do irreparable damage and injury to him, has never been departed from.*

"The views expressed in United States vs. Lee, 106 U. S., 196; New Hampshire vs. Louisiana, 108 U. S., 76; In re

Ayers, 123 U. S., 443; Hans vs. Louisiana, 134 U. S., 1 McGahey vs. Virginia, 135 U. S., 662 and numerous other cases, rendered further discussion unnecessary."

In the case of Tindal vs. Wesley, 167 U. S., page 204, above cited, the Court, in deciding the case, at page 220, said: "We are of the opinion that this suit is not one against the State within the meaning of the eleventh amendment, and as the record before us shows that the plaintiff owns the premises and is entitled to possession as against the defendants, the judgment must be affirmed." Here also the Osborn case is reaffirmed.

In 172 U. S., 527, Fitts vs. McGhee, the Court again cited with approval the case of Osborn vs. Bank of United States, and refers to the Penoyer case in 140 U. S., page 1, and other pages. We quote from pages 529 and 530, as follows: "Upon examination it will be found that the defendants in each of those cases were officers of the State, specifically charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. *There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against the officers of a State, merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the Courts of the State.*"

In the case of Gregg vs. Sanford, 65 Fed. Rep., p. 151, decided by the Circuit Court of Appeals for the 3rd circuit, in January, 1895, it was held that a suit brought against an officer of the State charged with the duty of assessing and collecting taxes, to restrain him from levying against the com-

plainant taxes not authorized by law, is not a suit against the State.

The case of Smith vs. Reeves, 178 U. S., 436, is not in conflict with the cases we have cited. In that case Reeves was sued *as Treasurer* of the State of California for the purpose of *compelling him to pay out of the treasury of the State of California a sum of money.* Authorities almost universally hold that where a suit is against the State or some officer of the State for the purpose of compelling the performance of a contract and in many cases to recover back money paid out or to compel the payment of money, it is against the State and within the prohibition of the eleventh amendment to the Constitution. But the case at bar is not such a case.

The case of Illinois Central R. R. Co. vs. Adams, 180, U. S., 28, was a case where a bill in equity was filed by the Railroad Company vs. Wirt Adams, Revenue Agent, a citizen of the State of Mississippi. The question as to whether or not it was a case against the State is discussed on pages 27 to 39.

It was there held that the question as to whether it was against the State or against an individual should be raised by demurer or by other pleadings, instead of by motion. But we submit that, while the defendant has demurred in this case, under the effect of previous decisions herein cited, this suit can be maintained.

We insist from this review of authorities above cited, both State and Federal, that this amended bill of complaint in which we are entitled, under the special prayer, as well as the prayer for general relief, to an injunction, restraining the Auditor General of the State of Michigan and his successors in office, and the several County Treasurers and their successors in office from selling, alienating or in any way disposing of the complainant's lands, to enforce invalid and void taxes against them, is maintainable.

We desire now to direct the attention of the Court to the merits.

Were the Legislature to enact that one man should pay all the taxes of the State, the law would be immediately pronounced illegal and unconstitutional. So self evident would its illegality be that its terms have only to be stated to be condemned.

Extreme as this statement is, it is an accurate statement of the operation of the General Tax Law of the State of Michigan. There is no authority for the collection of taxes in Michigan except the Constitution and the statute.

"A tax cannot be collected if not authorized by written law."
Folkerts vs. Power, 42 Mich., 283.

Every essential proceeding in a tax levy must be taken in conformity with the requirements of law, and must appear in some written and permanent form in the records of the bodies authorized to act upon them, a parol levy of taxes not being legally possible under the laws of the State of Michigan.

Palmer vs. Rich, 12 Mich., 414.
Moser vs. White, 29 Mich., 60.
Mills vs. Township of Richland, 72 Mich., 100.

The Constitution requires, as we have shown in the statement of the case, that the Legislature provide annually for the deficit in the resources. This is a Constitutional requirement, (Art. 14, Sec. 1), and cannot be altered or disobeyed by the Legislature. It is presumed that the Legislature and the officers of the State and its municipalities observe the requirements of law. Each year, then, the Legislature and State officials include in the general amount that must be raised by taxation the unpaid taxes of the previous year. Neither the

State nor its officers will be heard to say that it does not do so, because the Constitution imposes the duty. As a matter of fact it is done. And, in the same manner, the Counties, Townships, Cities, Villages, in short, all the municipalities of the State, include each year in the general amount to be raised by taxation as part of the taxes, the amount of the deficiency arising from the unpaid taxes of the previous year.

This means that in each succeeding year those who have paid their proportion of the taxes of the previous year pay an additional proportion of the same taxes, because the deficiency of the previous year, being included in the general amount to be raised by taxation, is levied generally and is assessed upon those who have paid as well as those who were delinquent. Thus one township makes up the deficiency occurring in another township, and one county the deficiency in another county.

If it were a fact that only one township, county, or person, in the State of Michigan, paid taxes, the operation of the law as we have pointed it out would result in that township, county or person eventually paying all the taxes of the state. The system is tolerated and the wrong concealed, simply because the iniquity is widely distributed, both as to persons and amount.

We are likely to be met here with the objection, How can you remedy this system? We submit that it is no part of our duty to supply a remedy, even though we have destroyed the existing law. In this case, however, the remedy is so obvious, equitable, and easy of accomplishment, that we suggest it in order that we may meet all possible objections: *The percentage of deficiency can easily be ascertained, and if to the total amount to be raised by taxation, an amount equal to that percentage is added, then everyone would contribute equally to the deficit as well as to the other funds to be raised by taxation,*

and the deficiency or deficit and penalties for its non-payment would then fall upon those to whom it properly belongs, viz the delinquents, instead of upon him who has paid promptly.

We have pointed out that the Legislature has construed the Constitutional term, "cash value," and we submit that apart from such construction by the Legislature being an usurpation of judicial functions, it is a wrong and illegal construction of that term. The framers of the Constitution intended, by requiring property to be assessed at its cash value, to establish a standard method of assessment which would be general throughout the State.

"Cash value" ordinarily, we think, means the price which property will bring at a forced or public sale. It is common knowledge and the Court will take judicial notice of the fact, that in such a State as Michigan much property is being disposed of continually at forced or public sale. To permit an Assessing Officer to say that that property may bring more at a private sale is to permit him to discriminate in the assessment of all property. In other words, the Legislature has attempted to evade the Constitutional provision and, by the construction which we have quoted, permitted every assessing officer to fix his own standard of value.

Appellant's lands were assessed at five dollars per acre, when they had cost only sixty-two and a half cents (62½c) per acre, and when he was offering to sell them for two dollars, one dollar and seventy-five cents, and finally one dollar and a half per acre and was receiving offers for them of only one dollar per acre. Such an assessment is void. The defendants admit that that void system was employed with reference to Appellant's lands.

The General Tax Law provides that before the property of any citizen is assessed, the Assessing Officer shall obtain from

him a sworn statement of his property, to be used as the basis of making the assessment. After the assessment is made and the tax is levied, the Collecting Officer is required, by law, to demand payment from the taxpayer personally, and, before returning the taxes unpaid, is required by law to seize so much of the personal property of the taxpayer as is sufficient to pay all taxes assessed against him. All of these provisions are for the benefit of the taxpayer.

Merritt Chandler, in all of the municipalities involved, had at all times more than sufficient personal property to satisfy all demands against him for taxes; but in no instance was any demand ever made upon him for a statement, for payment, or any seizure made of his property for taxes.

Where lands have been sold for non-payment of taxes every pre-requisite required by law must be complied with. Provisions for the benefit of the taxpayer are mandatory, not merely directory, and must be observed.

Williams vs. Peyton, 4 Wheaton, 77.
Thatcher vs. Powell, 6 Wheat. 127.

It may be objected that we are here complaining of non-compliance with statutory proceedings and at the same time attacking that statute as unconstitutional. In other words, that we are at one and the same time claiming that the law is void and objecting that its provisions have not been complied with.

One can best grasp the case made by the bill if he will bear in mind that we have alleged grounds upon which we claim the law is illegal and unconstitutional, and have also alleged grounds independently of the unconstitutional law, showing that the law was rendered unconstitutional by the methods in which it was administered.

New York vs. Lever, 100 U. S., 539.

In showing the non-compliance of the officers of the State with the requirements of the Tax Law, we are in reality only supporting by additional evidence the claim that Appellant is deprived of his rights and property, contrary to the Federal Constitution, particularly the 14th Amendment thereof.

We have shown that, in the Counties in which these lands are situate, upwards of four and a half million ($4,500,000.00) dollars of personal property was intentionally and fraudulently omitted annually from the tax rolls. The ommission of this large amount of taxable property threw a greater burden upon Appellant and his property and increased the amount of taxes assessed against him annually. This fact is not and cannot be controverted. The demurrers admit it. Since the appointment in 1899, of a Board of State Tax Commissioners, an elaborate investigation has been conducted into the conditions of taxation in the State of Michigan. We quote as follows from the first annual report of the Board of State Tax Commissioners, for the year ending December 15, 1900:

"Probably not one dollar in five hundred on deposit in the banks of Michigan is reached by the Assessor for taxation, and never has been.

"It is doubtful if a half million dollars, in the whole State, was assessed upon deposits in private, State or National banks. By the report of the State Bank Examiner, there was upon deposit in the State and National banks of Michigan, including three Trust Companies, at near the same time, $149,353,311.37, and this amount had increased to $160,876,409.33 on September 5, 1900.

"It will thus be seen that to execute the law fully in these cases would be grossly unjust. Such injustice, however, cannot be chargeable to the State. There are many elements entering into it."

Report, pp. 21 and 22.

"There is certainly no justification for this favoritism now shown." (Page 25, referring to the exemption of Building and Loan Association stocks.)

"The practical results of the working of the Commission may be sumed up in the statement that $350,000,000.00 more of property appears upon the assessment rolls of the State for this year than ever before in her history; and we venture the assertion that this sum could legitimately have been advanced many millions more had there been more time to work out the conditions before the law compelled the assessment of properties to be closed." (Report, pp. 119 and 120.)

"The evil of undervaluation or overvaluation is the far greater crime when wilfully made, because it almost directly steals from the one to pay the other's taxes." (Report, p. 130.)

The report, which is an official document of the State, is a body of evidence substantiating the claim we here make. How unjust then would it be to deprive Appellant of his property which is visible, fixed, and the first to attract taxation, when he is the victim of the oppression which this report gives in detail. No words of ours can picture the ineffectiveness of the system better than these of the Commission: "It will thus be seen that to execute the law fully in these cases would be grossly unjust." An avowal by the highest taxing authority that the law is purposely disobeyed and persons and property selected for taxation. *Official legislation.*

There is no attempt made by the laws of the State of Michigan to classify property for taxation. In making assessments, property is described as real or personal, as the case may be; but the same rate of taxation is applied to both classes of property alike. Such a jumbling of property together for taxation is unconstitutional. The Court will take judicial notice of the fact that the uses of property are different, and to tax deposits in a bank, upon which interest at the rate of three per cent. per

annum is paid, at the same rate as improved real estate, the value of which is determined by the income it yields over and above taxes, depreciation, and interest on the investment, and where the average tax rate is two per cent, is discrimination in favor of one class of property as against another, and amounts to confiscation.

"A system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens."

Pac. Ex. Co. vs. Seibert, 142 U. S., 339 at p. 351.
W. U. Tel. Co. vs. Indiana, 165 U. S., 304.

The General Tax Law requires the Circuit Court, sitting as a Court of special and limited jurisdiction, to enter a decree against all lands against which no objections have been filed. *The Court has no discretion in the matter.* It is a common thing to find in the tax record, which contains the proceedings of the Court in these tax cases, that objections have been sustained to a tax against one description of property in a township and a decree entered for the taxes against the remaining descriptions, where the objections sustained invalidated the entire tax. Yet under the General Tax Law, the Court was compelled to enter a decree for taxes which the Court knew to be illegal. This substitution of the Legislative will for judicial determination is one of the most dangerous and unwarrantable invasions of the rights of the citizen.

"The Court of Chancery has only such jurisdiction in tax proceedings as the Statute gives it."

Conn. Mut. Life Ins. Co. vs. Wood, 115 Mich., 444 p. 452.

The history of taxation in Michigan shows that previous to 1882 no attempt was made to have a judicial determination of

the validity of the taxes before the sale. It was left for the purchaser to fight out the validity of his title with the owner of the original title. In 1882 a law was passed providing for a judicial determination of the legality of the tax before sale, but by a divided Court, that Act was nullified. (Tax cases, 54th Mich.)

In 1885 the Legislature re-enacted the previous system of simply advertising the lands for sale. In 1889 the law was again changed and provision made for personal service. This was abandoned in 1891, and in 1893 the present system was adopted.

Under the law of 1893, a notice is published that the Auditor General will ask a decree against the lands mentioned in the notice for the amount of taxes stated, which are claimed to be a lien upon the land, and the lands will be sold for the taxes, on the first Tuesday in May following.

This notice is the only process in the case, and as we have pointed out, it does not run "In the Name of the People of the State of Michigan," as required by the Constitution. Not only is it defective as process, but the whole proceeding gives the State special standing and advantages as a suitor.

"When the State, as plaintiff, invokes the aid of the Court of Equity, it is not exempt from the rules applicable to ordinary suitors, that it must establish a case of equitable cognizance and a right to the particular relief demanded."

People of New York vs. Canal Board of New York, et al., 55 N. Y., 390 at page 395.

If it is true that the State can not create a special procedure for itself, and have a special standing as a suitor, it is equally true that it cannot drag Appellant and other citizens into Court by a mere public notice in lieu of process.

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When the Constitution of the State of Michigan was adopted, and when the Fourteenth Amendment to the Federal Constitution was ratified by the State of Michigan, it was no part of the policy of the State to enforce collection of its taxes as attempted under the law of 1893.

The creation of the special tribunal to hear the tax cases is not an exercise of a special prerogative of the State. The prerogative of the State in tax matters extends only to the assessment of the property, the levy of the tax, and the sale of the land after due notice given, as was done under the law previous to 1882.

The method of sale of lands for taxes adopted by the State discriminates against the owner. The lien of the State for taxes is sold to him who will take the least undivided interest in the lands and pay the tax. No one, of course, does this, for no one wishes to become a tenant in common with the owner of the original title. If no one will take the undivided interest, then the entire parcel is sold for the tax assessed against it. This system of selling the land necessarily discourages bidding and does not realize for the owner the best price for the land.

By reference to Section 19 of the General Tax Law, heretofore quoted at length, (this Brief pp. 4-6), it will be seen that individuals cannot deduct indebtedness except from credits, while companies or corporations, including partnerships, can deduct indebtedness from the total valuation of their personal property. Here is an evident discrimination in favor of corporations as against individuals. But, if the individual or company happens to be the owner of vessels and marine property, then the indebtedness may be deducted from the total value of all the property.

Appellant shows that he is indebted in respect of his said lands to the amount of fifty cents per acre; but, under the

law, he cannot have this deducted from the total value of his property, and have the balance assessed as real estate. If, however, his real estate were in the form of docks and other marine property, he could make such deduction. Or, if he organized a company to hold said lands, he could through the agency of the corporation deduct his indebtedness from the personal property of said company and thus relieve his real estate.

Such arbitrary exercise of power is unconstitutional.

"It is not competent for the Legislature under the 14th Amendment to classify lands for purposes of taxation into lands owned by railroad companies and lands owned by all other persons and declare that the former should not and the latter should be taxed."

Railroad Company vs. Walker, 47 Federal Reporter, 681.

The section of the statute we have quoted is directly within the condemnation of the principle here enunciated.

The printing of the tax lists is paid for at an extravagant price. We have shown that the Constitution of the State of Michigan requires all printing for, or ordered by, the Legislature, to be let by contract to the lowest bidder. The printing of the tax notices, being authorized by the General Tax Law, is, we submit, printing ordered by the Legislature. If that printing were let by contract, it would probably be done for five cents per description As it is, the Auditor General, under authority of law, pays forty cents per description for such printing, and selects the newspaper in which it shall be done. In other words the public funds can be diverted for partisan purposes.

Although the entire expenses of the administration of the State are provided for by taxation, yet, against each descrip-

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tion of land a dollar is charged for cost of advertising and expenses of sale, and, in addition, a collection fee is added.

All of these charges are, we claim, double taxation and discriminate against the man against whom they are charged, and render the law unconstitutional.

We have referred to "homestead lands." These are lands bid to the State on which the taxes have remained unpaid for three years. They are subject to entry as homestead lands. The taxes due the Township, County and State are cancelled and the lands are sold to the homesteaders for ten cents an acre, conditioned upon five years continuous residence and improvement. The State, previous to the filing of the bill, not only cancelled the taxes due the Townships and County from said lands, but appropriated the whole of the purchase price. This threw upon the remaining lands subject to taxation an additional burden equal to the taxes cancelled, and forced the owners thereof to contribute an additional portion of a tax of which they had already paid their proportion. Since this bill was filed the law has been changed, so that now the purchase price is divided among the State, County, and Township, in proportion to the amount of taxes due each. (This Brief, p. 18). This amendment of the law would seem an admission of the force of Appellant's objection.

The General Tax Law pretends to give the owner of lands notice after the period of redemption expires with the privilege of discharging the tax lien by payment of 100 per cent, together with costs and expenses, to the purchaser of the tax-title. The purchaser of the tax-title is to serve the notice "upon the grantee or grantees under the last recorded deed in the regular chain of title to said land and upon the mortgagee or mortgagees named in all undischarged recorded mortgages

or any assignee thereof" (General Tax Law 1893, Sec. 140); but this notice may be served by registered mail or publication in case the Sheriff of the County where the land is situate returns that the person named in the notice cannot be found or his postoffice address ascertained. Such a notice is a farce. It does not necessarily reach the owner of the land. It does not take into account the rights of a person in possession. There is no duty resting upon any one to record his deed. Such a notice served upon the grantor of a person who has not recorded his deed might be responsible for the grossest fraud by collusion between the tax-title purchaser and former grantor. This provision of the law is not calculated to benefit anybody but the dealer in tax-titles. The provision is of doubtful validity for other reasons. It undertakes to control private property in the hands of the owner and by Legislative enactment transfer property from one citizen to another.

It is objected that if the laws are void, then the titles acquired or asserted under them are of no force and it is unnecessary to declare them invalid or set them aside.

There is no force in such an objection. They remain a cloud upon Appellant's title, which he is entitled to have removed. And defendants are insisting and asserting that all such proceedings and titles are constitutional and valid.

Void assessments can never become the basis of a valid decree.

Without a valid assessment no subsequent steps can have any color or validity.

Blackwell on Tax Titles, (5th Ed.) Sec. 194.
Black on Tax Titles, Sec. 89.

"An invalid decree of sale for taxes should be annulled by reversal instead of being permitted to stand as a null decree. And both parties should be placed in the condition in which

they would have been if no proceedings in Court had been taken."

State of Michigan vs. Eddy, 58 Mich., 318.

"Where tax deeds appears upon their face to be clouds upon the plaintiff's title, a bill in equity is the proper form of obtaining relief."

Gage vs. Kaufman, 133 U. S., 471.

The Act gives the Auditor General, a purely administrative officer, power and authority by issuing Certificates of Error to cancel deeds without a hearing and upon evidence satisfactory to him.

This legislation cannot be justified. To cancel a deed is the highest exercise of judicial power apart from holding a law unconstitutional.

We could continue at length the particulars of this indictment against the General Tax Law of the State of Michigan. We think, however, that we have pointed out defects enough going to the whole administration of the tax law to entitle us to a decree that the law is unconstitutional.

Even if the changes made in the law since the bill was filed in this case have remedied some of the defects, others remain, and even if tax titles, acquired since the law has been so changed, are valid, still all tax titles for sales previous to the filing of the Bill must be declared invalid.

The Court will look to what the law requires—not to what may be done under it.

P. C. C. & St. L. Ry. vs. Backus, 154 U. S., 421.

For example, since this Bill was filed, an opinion has been rendered by the Attorney General of the State that Section

19 (found in full on pages 4-6 of this Brief), is in effect unconstitutional for the reasons that we have given, and he has instructed the Assessing Officers of the State to disregard it. Consequently it has been disregarded; but there has been no repeal of the section or amendment of it by the Legislature. We quote from the opinion:

"The amount of the Seventh Item shall be deducted from the amount of the Fourth Item, and the balance, if any, assessed as the cash value of the personal estate. The amount of the Sixth Item shall be deducted from the amount of the Fifth Item, and the balance, if any, assessed as personal.

"This is a General Rule authorized by the Legislature for the purpose of ascertaining the personal property of a corporation for purposes of taxation where no other method is expressly provided for in the General Tax Law, which in substance is a double rule for ascertaining the amount of the personal estate. In my opinion the Assessing Officer has authority to resort to either of these rules for the purpose of determining the personal estate, but not to both. In other words, the Assessing Officer would have no authority to deduct the amount of the Seventh Item from the amount of the Fourth and add the amount, so obtained, to the Fifth Item after deducting the Sixth. This, of course, is the General Rule applying to associations incorporated and unincorporated, but where in the General Tax Law the Legislature has expressly provided how the property of certain corporations shall be assessed, then in that case the special provision governs.

"Section 19 is but a small part of the General Tax Law and in placing a construction upon it we must consider the whole Act in so far as its several sections bear upon the particular point under consideration, and no literal construction can be resorted to that in any way violates the clear intent of the Legislature. It is only necessary to call your attention to the provisions of Section 22 to show that the Assessing Officer is not bound by any of the sworn statements made in accordance with Section 19, and may resort to other means for the purpose of obtaining the requisite information in order to

make a just and lawful assessment. It is also clear that there are certain minor inconsistencies in said Section 19 contained, when it is considered in the light of certain other sections of said law, and whenever it conflicts with or contravenes any of the express provisions of saidAct in regard to the manner of making the assessment, the provision stating of what personal property shall consist and the exemptions provided for, then and to the extent of such contravention, it must give way to the more important and express provisions of the statute."

Opinion of the Attorney General, (Detroit Legal News,) April, 1900.

Nothing could better illustrate the hopeless confusion in which this General Tax Law involves the Officers and Assessors than this opinion of the Attorney General. *It is another instance of Official or Executive Legislation.*

Since the above opinion was rendered, the Supreme Court of the State of Michigan, held Section 19 unconstitutional and void because it provides for doubly taxing the property of corporations; but the objections we make have not been considered and as they go to the whole Act, the unconstitutionality of this Section, which the defendants must admit, extends to and nullifies the entire Act.

Citizens St. Ry. Co. vs. Common Council, 125 Mich., 673, at p. 694.

This being the case, it follows that the whole Act is unconstitutional, because we are forced to the conclusion that the Legislature would not have adopted the Act had it known or thought the provisions of Section 19 could not be enforced, and we cannot do better than quote, in support, the following language of Mr. Justice Harlan, from Connolly, et al., vs. The Union Sewer Pipe Company, where the Illinois Anti-Trust Law was before the Court:

"The principles applicable to such a question are well settled by the adjudications of this Court. If different sections of a Statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. *But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire Statute must be held inoperative.* The First Section of the Act, here in question, embraces by its terms, *all* persons, firms, corporations or associations of persons who combine their capital, skill, or acts, for any of the purposes specified, while the Ninth Section declares that the Statute shall not apply to agriculturalists or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the Act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the Legislature intended that they should not be regarded as offending against the law, even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking, then, at all the sections together we must hold that the Legislature would not have entered upon or continued the policy indicated by the Statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the Statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the Ninth Section."

Connolloy vs. Union Sewer Pipe Co., 184 U. S., 540, at p. 565.

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Mutatis mutandis, the same remarks are applicable to the Michigan Tax Law. In the case of Connolly vs. Union Sewer Pipe Company, the Anti-Trust Law of Illinois was held unconstitutional, for the reason that the persons protected by Section Nnie would, unless the whole Act were held unconstutional, come within and under the remaining provisions of the Statute; and so in this case of Chandler vs. Auditor General, if Section 19 of the Act be stricken out, without declaring the whole Act void, then those persons whose assessment is fixed by Section 19 are deprived of the benefit of that section and must come within the other and remaining provisions of the Tax Law, although the Legislature, by Section 19, plainly exempted them from the operation of the other sections of the law.

This case at bar is based entirely upon violations of fundamental principles, so sacred that they are subject of constitutional protection.

Upon the important questions involved in this suit the decisions of the State Courts are not controlling, for the reason that, apart from the Federal questions, only questions of general law are discussed; and the Federal Courts will determine those questions for themselves without reference to the decisions of the State Court.

"Now, whether a use is public or private, is not a question of constitutional construction. It is a question of General Law. It has as much reference to the Constitution of any other State as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single State tribunal, but in general principles common to all Courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted Legislative power, are matters which, like questions of commercial law, no State Court can conclusively determine for us."

Olcott vs. Fond du Lac, 16 Wall., 678.

The above language of the United States Supreme Court was used in overruling Whiting vs. R. R. Co. and Whiting vs. Fond du Lac, 25 Wis., 167.

We submit, therefore, that not only have we made out a case in equity entitling the Appellant to relief, but we have also presented such a case as overcomes all technical defences such as have been urged here by demurrer and that the grounds of demurrer, for the reasons we have given, should not prevail. And we ask that the decree of the Circuit Court of the United States be reversed, and that a decree be entered here for the Appellant, or the case remanded for further proceedings.

JOHN A. McKAY,
Solicitor and of Counsel for Merritt Chandler, Appellant.

GEORGE W. WEADOCK,
Of Counsel for Merritt Chandler, Appellant.